IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TONY KOLE, *et al*.,	
Plaintiffs,	**No. 11-CV-03871**
v.	**Hon. Judge Thomas M. Durkin** **U.S. District Judge**
VILLAGE OF NORRIDGE,	**Hon. Morton Denlow** **U.S. Magistrate Judge**
Defendant.	

DEFENDANT'S RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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DEFENDANT'S RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

NOW COMES Defendant, Village of Norridge, by its counsel, and in response to Plaintiff's motion for summary judgment states as follows:

INTRODUCTION

The Village of Norridge ("***Village***") has licensed weapons dealers since at least 1972. ("***Original Ordinance***" or "***1972 Ordinance***"). (Doc. Nos. 198-2, 190-9). In June 2010, the Supreme Court held the Second Amendment applicable to the states for the first time. (*McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 750 (2010)). Plaintiffs formed an LLC in July 2010 and approached the Village about opening an online weapons dealer business in August 2010. (Doc. Nos. 197 ¶ 4, 190 ¶¶ 8-9, 190-4). In November 2010, the Village negotiated an Agreement with the Plaintiffs (Doc. No. 198-8, 190-8), so Plaintiffs could operate their business, while the Village studied its weapons dealer regulations under a new regime of gun rights. To that end, the Village repealed the 1972 Ordinance in February 2011, but the Agreement exempted Plaintiffs from the repeal. (Doc. Nos. 189-10, 190-10 ("***Revised Ordinance***" or "***2011 Ordinance***")). In June 2011, Plaintiffs responded with this lawsuit. (Doc. No. 1). Nevertheless, the Village did study and adopt new weapons dealer regulations authorizing commercial arms sales outside sensitive places. (Doc. Nos. 198-11, 190-11 ("***New Ordinance***" or "***2013 Ordinance***").

Plaintiffs only seek summary judgment on their Second Amendment (Count I), Dormant Commerce Clause (Count III), and their Second and Fourteenth Amendment retaliation claims (Count VI and Count VII) of their Third Amended Complaint. (Doc. 206 at 2). To the extent that Plaintiffs claims are even justiciable, Plaintiffs Second Amendment claim fails because commercial arms sales in sensitive places fall outside the scope of the Second Amendment right.

Additionally, the Village's weapons dealer regulations bear a substantial relationship to the Village's important public safety goals. Plaintiffs' Dormant Commerce Clause claim fails because any burden on interstate commerce is not clearly excessive in comparison to the important public safety benefits of the Village's weapons dealer regulations. Finally, Plaintiffs' retaliation claims fail for the same reason as their substantive claims. Plaintiffs' motion for summary judgment should be denied, and the Village should be granted judgment as a matter of law on all of Plaintiffs' claims.

ARGUMENT

I. Plaintiffs' Claims are not Justiciable because Plaintiffs' Facial Challenges are Moot, and Plaintiffs Lack Standing for their As-Applied Challenges

A. Plaintiffs' Facial Challenges are Moot

Plaintiffs only make facial challenges to the Agreement, 2011 Ordinance, and 2013 Ordinance. (Doc. No. 206 at 9 (discussing facial nature of Plaintiffs' claims)). Therefore, Plaintiffs claims are moot because the ordinances have been repealed, and but for this litigation, the Agreement would have expired. (Doc. No. 195 at 2-3). As a result, Plaintiffs' request for summary judgment on their facial challenges to the Agreement, 2011 Ordinance, and 2013 Ordinance should be denied, and the Village should be granted judgment as a matter of law.

B. Plaintiffs Lack Standing for any As-Applied Challenges

1. Plaintiffs Lack Standing to Challenge their Self-Imposed Conditions in the Agreement

Plaintiffs' alleged harms are not fairly traceable to the Village. (Doc. No. 195 at 3-4). Nearly all of the conditions in the Agreement were required by Plaintiffs' lessor, or were suggested by the Plaintiffs. (*Id.*). Plaintiffs were not "coerced" in to accepting any conditions in the Agreement, and therefore lack standing to challenge the alleged unconstitutional conditions.

2. Plaintiffs make no As-Applied Challenge to the Agreement, 2011 Ordinance, or 2013 Ordinance

Plaintiffs' only challenges to the 2011 Ordinance and 2013 Ordinance are moot facial challenges. (Doc. 206 at 9). Plaintiffs present no facts or argument about the constitutionality of the Agreement, 2011 Ordinance, or 2013 Ordinance as-applied to the Plaintiffs. (Doc. 206 at 6-25). Therefore, in the absence of any as-applied claims, Plaintiffs' request for summary judgment should be denied.

3. Plaintiffs Lack Standing to Pursue an As-Applied Challenge to the 2011 Ordinance because the 2011 Ordinance Never Applied to Plaintiffs

Plaintiffs could not bring a challenge to the 2011 Ordinance because they were exempt from the 2011 Ordinance. (Doc. No. 195 at 5). Plaintiffs incorrectly contend that under the 2011 Ordinance, "all weapons dealers were banned in the Village as of April 30, 2013. Plaintiffs were to be forced out of business as of that date." (Doc. No. 206 at 7). Plaintiffs were not forced out of business as of that date, and they continued operating the entire time the 2011 Ordinance was in effect under the terms of the Agreement. (Doc. No. 198-8 ¶ 13; Doc No. 190-32). In fact, the repeal of the 2011 Ordinance did not result in a "ban," it actually ended the licensing requirements for weapons dealers until the 2013 Ordinance was adopted. (Village of Norridge, Ill. Code § 22-31 ("It shall be unlawful for any person to engage in a business requiring a license without having first obtained a license therefor." (emphasis added)); Doc. Nos. 189-10, 190-10 § 22-371 ("This article shall remain in effect only until midnight on April 30, 2013 and as of that date and time this article is hereby repealed and there shall be no weapons dealers licensed within the Village.")(emphasis added)). Plaintiffs' request for summary judgment should be denied, and judgment should be entered in favor of the Village, because Plaintiffs lack standing to bring any challenge to 2011Ordinance.

4. Plaintiffs Never Made Concrete Plans to Open a Physical Gun Store

Even if the Court considers the application of the 2011 Ordinance or 2013 Ordinance to the Plaintiffs, the Plaintiffs never made a substantial effort to open a physical gun store in the Village under either ordinance. (Doc. No. 195 at 6). Plaintiffs' hollow expression of desire to operate a physical weapons dealer location (Doc. No. 197 ¶ 16), without any other concrete efforts, does not establish standing for any as-applied challenge. Plaintiffs' motion for summary judgment should be denied, and the Village should be granted judgment as a matter of law.

II. Plaintiffs' Request for Summary Judgment is Narrow

A. Only Plaintiffs' Second Amendment and Dormant Commerce Clause Claims are at Issue in Plaintiffs' Motion for Summary Judgment

To the extent that the Court considers the merits of Plaintiffs' claims, Plaintiffs only seek summary judgment on their Second Amendment (Count I), Dormant Commerce Clause (Count III), and their Second and Fourteenth Amendment retaliation claims (Count VI and Count VII). (Doc. 206 at 2). Plaintiffs do not seek summary judgment on their First Amendment claim (Count IV), and therefore Plaintiffs' discussion of their alleged First Amendment rights is irrelevant. (Doc. No. 206 at 6-23, 25-28). Furthermore, Plaintiffs' Second and Fourteenth Amendment retaliation claims are properly analyzed under their Second Amendment claim. (Doc. No. 195 at 34-35, 42-43). Therefore, Plaintiffs' request for summary judgment is limited to their Second Amendment claim (Count I), and Dormant Commerce Clause claim (Count III).

B. Plaintiffs Make no Relevant Argument about the Agreement

Plaintiffs' Second Amendment claim only attacks the alleged "bans" on weapons sales imposed by the 2011 Ordinance and 2013 Ordinance. (Doc No. 206 at 8 (challenging "2011 gun store ban"); Doc No. 206 at 23 (challenging 2013 Ordinance as "functional ban")). Plaintiffs fail to explain how the Agreement contributes in any way to these alleged "bans," especially where the Agreement actually authorized the Plaintiffs to conduct weapons sales in the Village. (Doc. No. 198-8). Similarly, for its Dormant Commerce Clause claim, Plaintiff does not explain how the Agreement could affect interstate commerce, when the Agreement only applied to Plaintiffs. (Doc. No. 206 at 23-25). Plaintiffs only squarely discuss the Agreement in their First Amendment analysis (Doc. No. 206 at 25-28), but as discussed in Section II.A above, Plaintiffs do not seek summary judgment on Plaintiffs' First Amendment claim. As a result, Plaintiffs' summary judgment motion is only directed at the 2011 Ordinance and 2013 Ordinance.

III. The Agreement, 2011 Ordinance, and 2013 Ordinance Lawfully Regulate the Commercial Sales of Arms in Sensitive Places in accordance with the Second Amendment (Count I)

Plaintiffs do not clearly analyze their Second Amendment claim according to the Second Amendment framework set forth in *Ezell v. City of Chicago*, 651 F.3d 684, 702-03 (7th Cir. 2011). The restricted activity, commercial sales of arms in sensitive places, is not protected by the Second Amendment. (Doc No. 195 at 7-20). Even if the regulated activity is not outside the scope of the Second Amendment, the Village's regulations bear a substantial relationship to important government interests, satisfying the appropriate level of scrutiny for presumptively lawful regulatory measures. (Doc. No. 195 at 20-34).

A. The Restricted Activity, Commercial Sales in Sensitive Places, is not Protected by the Second Amendment

The regulated activity in this case is commercial arms sales in sensitive places. Plaintiffs contend that the regulated activity is "purchasing arms for self-defense and lawful purposes . . . ." (Doc. No. 206 at 8), but this ignores the plain object of the Village's regulations. A textual and historical inquiry in to the Second Amendment's original meaning confirms that the Second Amendment was never understood to require commercial arms sales in sensitive places. (Doc.

No. 195 at 19-20). Accordingly, the analysis can stop here because the Agreement, 2011 Ordinance, and 2013 Ordinance regulate activity falling outside the scope of the Second Amendment right. (*Id.* at 20).

2. Commercial Arms Sales in Sensitive Places Fall Outside the Scope of the Second Amendment

Plaintiffs' claimed "right to sell" or "right to purchase" firearms ignores the textual and historical understanding of the Second Amendment right, which did not require commercial arms sales in sensitive places. (Doc. No. 206 at 1, 5, 8).

a. Right to Bear Arms in England and Colonial America

The English regulations cited by Plaintiffs actually confirm there was no "right to sell" firearms at common law. The sale of arms requires the possession of arms, and the English understanding of the right to possess arms allowed for severe restrictions. Plaintiffs note that Protestants were disarmed before the Glorious Revolution. (Doc. No. 206 at 13), and after the Glorious Revolution, the right to bear arms was limited to Protestants, and then only those arms "as allowed by law." (Doc. No. 195 at 9). Plaintiffs also cite Charles II's reporting requirements for gun sales, license requirements to transport guns, and ban on the importation of firearms. (Doc. No. 206 at 13; 10 HASTINGS CONST. L.Q. 285, 299-300 (1983)). Based on these common law regulations of arms possession and sales, Plaintiffs' claimed right to sell cannot be understood to require commercial arms sales in sensitive places.

The right to carry arms in public was restricted in colonial America, just as it was in England. (Doc. No. 195 at 9-10). In support of a claimed right to purchase, Plaintiff cites colonial-era writings suggesting militia members were expected to bear arms supplied by themselves (Doc No. 206 at 12-13); however, militia-related arms possession was subject to strict inspection requirements, and ordinary arms possession was subject to "laws prohibiting the use of firearms on certain occasions and in certain places, and laws disarming certain groups and restricting sales to certain groups." (Doc No. 195 at 9-10 (citing *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 200 (5th Cir. 2012)). Where weapons possession was strictly regulated at the founding, commercial arms sales requiring possession in sensitive places do not fit within the original understanding of the Second Amendment right.

b. Right to Bear Arms before Adoption of the Fourteenth Amendment

From the founding and through the adoption of the Fourteenth Amendment, the right to bear arms was understood to exclude weapons possession in sensitive places. Accordingly, commercial arms sales requiring possession in sensitive places are not protected by the Second Amendment. (Doc. No. 195 at 10-11).

Plaintiffs cite the writings of Thomas Jefferson out of context to support their claimed right to sell. On April 22, 1793, President George Washington issued a proclamation of neutrality in the war between Great Britain and France. (George Washington, "Proclamation 4 - Neutrality of the United States in the War Involving Austria, Prussia, Sardinia, Great Britain, and the United Netherlands Against France," April 22, 1793, available at http://www.presidency.ucsb.edu/ws/?pid=65475.) The British Minister to the United States complained that "considerable quantity of arms and military accoutrements, which an agent of the French Government has collected and purchased in this Country, is now preparing to be exported from New York to France." (Founders Online, Introductory Note: To George Washington, 15 May 1793, available at http://founders.archives.gov/documents/Hamilton/01-14-02-0306-0001 (last visited Sep. 19, 2016)). Jefferson responded that the United States would take a hands-off approach: it would not engage in an "internal derangement" of arms sales, but it would leave arms dealers subject to the

> "external penalty pronounced in the President's proclamation, that of confiscation of such portion of these arms as shall fall into the hands of any of the belligerent powers, on their way to the ports of their enemies. To this penalty our citizens are warned that they will be abandoned; and that the purchase of arms here, may work no inequality between the parties at war, the liberty to make them will be enjoyed equally by both."

(Enclosure I: Thomas Jefferson to George Hammond, 15 May 1793," Founders Online, National Archives, last modified July 12, 2016, http://founders.archives.gov/documents/Washington/05-12-02-0462-0002. [Original source: The Papers of George Washington, Presidential Series, vol. 12, 16 January 1793–31 May 1793, ed. Christine Sternberg Patrick and John C. Pinheiro. Charlottesville: University of Virginia Press, 2005, pp. 585–587).

Arms sales were plainly regulated, and would not be allowed to contravene the President's neutrality proclamation. Therefore, Plaintiffs' claimed "right to sell" does not require arms sales in sensitive places, just as it did not require exports to warring countries.

Plaintiffs inappropriately rely on the writings of John Curwen (Doc. No. 206 at n.3), a member of parliament that led an unsuccessful effort to repeal the Game Laws in 1796. (Richard S. Ferguson, M.A., Cumberland and Westmorland M.P's from the Restoration to the Reform Bill of 1867 (1660-1867) (1871) 214-15). The *Heller* court only cited Curwen to analyze the usage of the phrase "keep arms" (*D.C. v. Heller*, 554 U.S. 570, 583 (2008)). Curwen acknowledged the English Bill of Rights included a "restrained use of Arms" and allowed restrictions on public possession. (Curwen, Some Considerations on the Game Laws 54-55 (1796) ("[t]he Rules of good Government, in the spirit of careful watchfulness over the Public weal, have added, you shall not have the power to make the killing of Game a pretence for suffering this dangerous weapon to be the companion of your daily excursions.")). This reflects an understanding that any right to possess or purchase arms would be rightfully "restrained," and surely would not require the commercial sale of arms in sensitive places.

Plaintiff also cites a Virginia statute that only allows arms sales to "his majesties loyall subjects" and with certain friendly Indians. (Doc. No. 206 at n.3). However, considering that this right to keep arms would later be denied to any "negroe, mulattoe, or Indian" or "Papist," the alleged right to sell could not have been understood to require sales in all instances. (Laws of Virginia, March 1756 – 29, Va. Stat. at Large, 7 Hening 36 (1820); Laws of Virginia, March 1748 – 22d, Va. Stat. at Large, 6 Hening 106 (1819)). Additionally, where Virginia later specifically adopted its own version of the Statute of Northampton, prohibiting arms possession in sensitive places, any authorized arms sales to "loyall subjects" could not have taken place in sensitive places. (Laws of Virginia, March 1786 – 11th, Va. Stat. at Large, 12 Hening 334 (1823)).

c. Post-Civil War Right to Bear Arms

The post-bellum understanding of the Second Amendment right did not include the right to commercial arms sales in sensitive places. (Doc. No. 195 at 11-12). Plaintiffs cite a Tennessee court's discussion of the right to purchase, as part of that state's right to "keep" arms (Doc. No. 206 at 7); however, that same right was subject to time, place, and manner regulations. (Doc No. 195 at 12 (citing *Andrews v. State*, 50 Tenn. 165, 187-88 (1871)). Therefore, commercial arms sales were not required in sensitive places at the adoption of the Fourteenth Amendment.

d. Presumptively Lawful Regulatory Measures

Commercial arms sales in sensitive places fall outside the scope of the Second Amendment based on the *Heller* court's acknowledgement of conditions and qualifications on the commercial sale of arms, and prohibitions on gun possession in sensitive places, as presumptively lawful regulatory measures. (*D.C. v. Heller*, 554 U.S. 570, 626 (2008)). The Village's regulation of commercial arms sales in sensitive paces falls outside the scope of the

Second Amendment right, even if it does not have a precise founding-era analogue. (Doc. No. 195 at 12-19). Contrary to Plaintiffs' suggestion (Doc. No. 206 at 9), the Village's regulations need not mirror regulations from 1791 to be considered presumptively lawful. (*U.S. v. Skoien*, 614 F.3d 638, 640–41 (7th Cir. 2010)). Additionally, location restrictions for commercial arms sales and possession are common in this country (Doc. No. 195 at 12-19), contrary to Plaintiffs' claim that such regulations are "rare." (Doc No. 206 at 11-12). Based on the extensive regulation of commercial arms sales, and extensive prohibitions on firearm possession in sensitive places, commercial arms sales requiring such possession fall outside the scope of the Second Amendment right.

e. No Second Amendment Right to Commercial Arms Sales in Sensitive Places

A textual and historical inquiry in to the Second Amendment's original meaning confirms that the Second Amendment was never understood to require commercial arms sales in sensitive places. (Doc. 195 at 19-20). "Plaintiffs have operated on the assumption that regulations on firearms commerce fall within the scope of the Second Amendment. But Plaintiffs do not provide [. . .] any binding authority that so holds. Courts within the Ninth Circuit and elsewhere are split on the issue [. . . .]" (*Bauer v. Harris*, 94 F. Supp. 3d 1149, 1154 (E.D. Cal. 2015)).

Even the courts that have acknowledged some right to "acquire" a firearm acknowledge "that acquisition right is far from absolute: there are many long-standing restrictions on who may acquire firearms (for examples, felons and the mentally ill have long been banned) and there are many restrictions on the sales of arms (for example, licensing requirements for commercial sales)." (*Illinois Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 930 (N.D. Ill. 2014)).

Plaintiffs' reliance on *Teixeira v. Cty. of Alameda* is misplaced because that case was not decided on summary judgment, and the right to bear arms in that case was only found to extend "at least partly" to acquisition. (822 F.3d 1047, 1055 (9th Cir. 2016)). Unlike Alameda County in *Teixeira*, the Village in the instant case presented extensive support for the "longstanding" nature of its regulations as "longstanding" conditions and qualifications on the commercial sale of arms. (Doc. No. 195 at 7-20). Additionally, Alameda County and its fellow appellees are seeking *en banc* rehearing of the Ninth Circuit panel's decision in *Teixeira* (Case No. 13-17132, Doc. No. 79 (9th Cir. Jul. 21, 2016), in part based on the *en banc* decision in *Peruta v. County of San Diego*. (824 F.3d 919, 940 (9th Cir. 2016)). Based on the extensive historical analysis of weapons possession prohibitions in sensitive places in the *en banc* opinion in *Peruta* (*Id.* at 929-39), whatever right to purchase and sell firearms recognized by the *Teixeira* panel may not be extended to sensitive places after *en banc* rehearing.

Where commercial arms sales in sensitive places are categorically unprotected by the Second Amendment, the Agreement, the 2011 Ordinance, and 2013 Ordinance regulate activity falling outside the scope of the Second Amendment right, the challenged regulations are not subject to further Second Amendment review. (*Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011)).

B. The Village's Justifications Satisfy Intermediate Scrutiny

Even if the Court finds that commercial arms sales in sensitive places fall within the scope of the Second Amendment right, the Village's justifications satisfy intermediate scrutiny. Where Plaintiffs' facial challenges are moot (see Section I.A, *supra*), intermediate scrutiny applies to Plaintiffs' remaining as-applied challenges to the presumptively lawful regulatory measures in the Agreement, 2011 Ordinance, and 2013 Ordinance. (Doc. No. 195 at 21 (citing

United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010) (applying intermediate scrutiny to as-applied challenge to presumptively lawful regulatory measure)). The authority cited by Plaintiffs agrees. (Doc No. 206 at 10 (*United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (applying intermediate scrutiny to condition of commercial arm sales); *Teixeira v. Cty. of Alameda*, 822 F.3d 1047, 1063 (9th Cir. 2016)(remanding as-applied challenge for application of intermediate scrutiny upon showing ordinance merely regulates gun store locations); *Alameda Books, Inc. v. City of Los Angeles*, 631 F.3d 1031, 1040 (9th Cir. 2011) (intermediate scrutiny for adult use location restrictions)).

Intermediate scrutiny is particularly appropriate in this case because Plaintiffs are the only persons affected in their as-applied challenge. (*Ezell v. City of Chicago*, 70 F. Supp. 3d 871, 881-82 (N.D. Ill. 2014) (evaluating activity affected and persons affected for applicable scrutiny)). Additionally, the Village's regulations only impose modest burdens on the margins of Plaintiffs' self-defense right, a claimed right to sell arms to others. The Agreement merely regulates the day-to-day business operations of Plaintiffs' weapons dealer business, according to the terms Plaintiffs suggested. (Doc. No. 195 at 4). The 2011 Ordinance was not a "ban" of the sale of arms, as Plaintiffs suggest (Doc. No. 206 at 8), because Plaintiffs operated under the exclusive weapons dealer license in the Village the entire time the ordinance was in effect. (Doc. No. 195 at 26). While the 2011 Ordinance was in effect, the Village studied sensitive places in the Village and adopted the 2013 Ordinance, which merely regulates the location of weapons sales. (Doc. No. 195 at 26-27). Therefore, intermediate scrutiny is appropriate because the Plaintiffs can only challenge the Village's regulations as applied to them, and the regulations only impose a modest burden on Plaintiffs' self-defense rights.

Plaintiffs argue for the strict or near-strict scrutiny applied to the facial challenge in *Ezell*, but that level of scrutiny is inapplicable to Plaintiffs' as-applied challenges. (Doc No. 206 at 8-9; *Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011)). Furthermore, Plaintiffs would have this Court disregard the *Ezell* framework altogether, based on a claim that the Village's regulation of firearms "transcends levels of scrutiny . . . ." (Doc No. 206 at 8). The Court has already decided that the *Ezell* framework applies in this case (*Kole v. Vill. of Norridge*, 941 F. Supp. 2d 933, 944 (N.D. Ill. 2013) (citations omitted)), and should the Court decline to apply scrutiny, it should be due to the fact that commercial sales of arms fall scope outside the Second Amendment. (See Section II.A, *supra*). Just as the Seventh Circuit declined to "decide what 'level' of scrutiny applies" in upholding "categorical limits on the kinds of weapons that can be possessed" (*Friedman v. City of Highland Park, Illinois*, 784 F.3d 406, 410 (7th Cir. 2015)), this Court need not apply scrutiny to uphold categorical limits on the places weapons can be possessed for commercial sale. Should the Court apply scrutiny in the second step of the *Ezell* framework, the Agreement, 2011 Ordinance, and 2013 Ordinance satisfy intermediate scrutiny for the reasons set forth below.

1. The Village has Important Objectives in Promoting Public Safety and Reducing Crime in Sensitive Places

a. Public Safety

The Village has a compelling interest in regulating weapons dealers to promote public safety by reducing weapons possession in sensitive places. (Doc. No. 195 at 21-23). Since 1982, at least 283 people were killed and 330 people were wounded in mass shootings in schools, government buildings, and religious buildings in the United States. (Def. Add'l L.R. St. ¶ 2). Weapons sales require weapons possession, and the Village has an important interest in reducing weapons possession in sensitive places to promote public safety and reduce interference with the activities in such places.

Plaintiffs' claim that the Village lacks an important or substantial interest, and the baseless suggestion that the Village was motivated by "political fear and dislike of firearms," should be disregarded. (Doc. No. 206 at 13). The Village correctly relies on the Gun Free School Zones Act which, contrary to Plaintiffs contention, does restrict weapons possession within 1,000 feet of school grounds. (*Compare* Doc. No. 195 at 17 (citing 18 U.S.C. § 922(q) (limiting firearms possession in a "school zone") *with* Doc. No. 206 at 176; see also 18 U.S.C. § 921(a)(25) (defining "school zone" to include "a distance of 1,000 feet from the grounds of a public, parochial or private school.")). The Village's compelling public safety interest more than satisfies the requirement of an important government interest required under intermediate scrutiny.

b. Crime

Additionally, the Village has another important public safety goal in reducing the diversion of guns to criminals through weapons dealer licensing. (Doc. 195 at 23-24). Weapons dealers are targets for theft, and are a significant source of lost firearms. Between 2012 and 2015, federal firearms licensees in Illinois reported the theft or loss of 1,247 firearms, including 582 stolen firearms. (Def. Add'l L.R. St. ¶ 3).

Additionally, local weapons dealers are a considerable source of guns recovered in area crime scenes. Between 2009 and 2013, local weapons dealers sold more than 3,173 firearms later recovered in crimes in neighboring Chicago. (Def. Add'l L.R. St. ¶ 4). On average, 12% of those firearms moved from the local retailer to a crime scene in less than three years, "a strong indicator that the gun was illegally trafficked and 'suggests illegal diversion or criminal intent associated with the retail purchase from the FFL.'" (Def. Add'l L.R. St. ¶ 5). Where local weapons dealers have proven to be a significant source of crime guns, the Village has an important interest in licensing weapons dealers to reduce illegal trafficking and illegal use of weapons in sensitive places in the Village.

2. The Village's Conditions on the Commercial Sale of Arms in Sensitive Paces are Substantially Related to the Village's Important Public Safety Goals

The conditions in the Agreement are substantially related to the Village's important public safety goals, promoting safety and reducing crime in sensitive places. (Doc. 195 at 24-26). The Agreement allowed Plaintiffs to continue operating their original business model under the 2011 Ordinance, while the Village studied new weapons dealer regulations under a new regime of gun rights. (Doc. No. 195 at 26-27). The 2011 Ordinance proved to be temporary, with the adoption of the 2013 Ordinance, which substantially advanced the Village's public safety goals. The 2013 Ordinance reduced weapons possession and visibility in sensitive places by requiring weapons dealers to locate outside sensitive places in the B-3 District, a district designed to accommodate a "wide variety" of uses, such as weapons sales. (Doc. No. 195 at 27-30).

Plaintiffs make the novel argument that the Village is only allowed to regulate for "secondary effects" of weapons dealers, and that there are no "secondary effects" for the Village to regulate. (Doc. No. 206 at 16, 23-26, 28-30). Even if First Amendment secondary effects principles applied under the Second Amendment, the Village rightfully regulates weapons possession in sensitive places, a secondary effect of weapons sales and long-recognized important governmental interest dating back to common law.

Where the Agreement, 2011 Ordinance, and 2013 Ordinance are substantially related to the Village's important public safety goals, Plaintiffs' request for summary judgment should be denied, and judgment should be granted to the Village as a matter of law.

3. The 2013 Ordinance Provided Reasonable Opportunities for Weapons Dealers to Locate in the Village

The 2013 Ordinance provided a reasonable opportunity for weapons dealers to operate in the Village. Unlike other cases finding no "reasonable opportunity" for protected activity, there were no denied inquiries for a weapons dealer license in this case. (Doc. No. 195 at 30). Even if the Court accepts Plaintiffs' unprecedented position that municipalities must maintain a certain amount of land area for weapons dealers, the Village made an ample amount of land area available in an overwhelmingly residential community with limited space for commercial uses of any kind. (Doc. No. 195 at 30-31). The quality and the quantity of land area for weapons dealers was great, encouraging weapons dealers to locate in the most prominent, high-traffic retail corridors in the Village. (Doc. No. 195 at 32).

Additionally, Plaintiffs retain opportunities to operate as a weapons dealer in the relevant market area. (Doc. No. 195 at 32). Plaintiffs insist that the "reasonable opportunities" inquiry must end at the Village border, based on *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76-77, 101 (1981)). (Doc No. 206 at 14). However, "[t]he Supreme Court has left open the question whether, at least in the case of small municipalities, opportunities to engage in the restricted speech in neighboring communities may be relevant to determining the existence of adequate alternative channels." (*Peterson v. City of Florence, Minn.*, 727 F.3d 839, 843 (8th Cir. 2013) (finding reasonable alternative avenues outside jurisdiction) (citing *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76–77 (1981); *Int'l Eateries of Am., Inc. v. Broward County*, 941 F.2d 1157, 1165 (11th Cir.1991) (looking to the availability of other areas in the county for the operation of adult entertainment businesses to determine whether reasonable alternative avenues of communication exist); *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94, 98 (6th Cir. 1981) ("It might be that the First Amendment burden would be rendered incidental if, for example, county-wide zoning were present to ensure that there were reasonable access to the protected activity in nearby areas.")). Unlike the City of Chicago in *Ezell*, 651 F.3d at 697, the Village in this case is the type of small, overwhelmingly residential community entitled to establish reasonable alternative avenues for the sale of arms based on opportunities in the relevant market area. Plaintiffs do not dispute the availability of other weapons dealers in the area. (Doc. No. 198-4; Doc. Nos. 189-10, 190-10 (recitals); Doc. Nos. 198-11, 190-11 (recitals)).

Plaintiffs complain that the land area for weapons dealers under the 2013 Ordinance was occupied or not yet developed for retail use (Doc. No. 2016 at 4), but the Supreme Court rejected this argument in the First Amendment context because "[t]hat respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. (*City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) (occupied land, land not for sale or lease, or land not "commercially viable," considered for evaluating reasonable opportunity to operate)). Just as it is under the First Amendment, the Second Amendment should not be concerned with any economic loss caused by

Village regulations. (*Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 78 (1976) (Powell, J., concurring) ("The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. . . . The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression.")).

The Agreement, 2011 Ordinance, and 2013 Ordinance lawfully regulate the commercial sale of arms in sensitive places. There is no Second Amendment right to commercial sales of arms in sensitive places, so the Court's inquiry can end there. In any event, the Village's regulations are substantially related to its public safety goals by reducing weapons possession in sensitive places. Plaintiffs' motion for summary judgment should be denied, and the Village should be granted judgment as a matter of law.

IV. The Important Local Benefits of the 2011 Ordinance and 2013 Ordinance Exceed any Burden on Interstate Commerce (Count III)

Plaintiffs' Dormant Commerce Clause claim fails because Plaintiffs fail to show any burden on interstate commerce, and the importance of the Village's public safety goals exceed any alleged burden on interstate commerce. (Doc. No. 35-37). To evaluate Count III, the Court indicated that it must compare the burden imposed on interstate commerce with the putative local benefits of the Village's regulations. (*Id.* at 35-36). Plaintiffs do not identify a single Village regulation that affects or limits interstate commerce in any way. (*Id.* at 36-37). Nevertheless, any burden on interstate commerce would not be "clearly excessive" in relation to the important public safety benefits promoted by the Village's weapons dealer regulations. Plaintiffs' are not entitled to judgment as a matter of law on Count III, and summary judgment should be granted to the Village.

V. The Agreement Lawfully Prohibits Plaintiffs' Suggested Off-Premise Signs in Accordance with the First Amendment (Count IV)

As discussed in Section II.A above, Plaintiffs do not seek summary judgment on their First Amendment claim (Count IV). Nevertheless, Plaintiffs argue that the Agreement's retail display and advertising restrictions violate the First Amendment. (Doc. No. 206 at 25-28). However, the Court has already concluded that the retail display restrictions fail at the first step of the *Central Hudson* test. (Doc. 195 at 38). Additionally, Plaintiffs' self-imposed off-premise advertising restrictions in the Agreement directly advance the Village's aesthetic interests in prohibiting exterior signage for an off-site business at that location. (*Id.* at 39). Therefore, Plaintiffs would not be entitled to summary judgment, even if they did seek summary judgment on their First Amendment claims.

VI. Plaintiffs' Duplicative Retaliation Claims Fail for the Same Reasons as their Substantive Claims (Counts VI and VII)

Plaintiffs' Second Amendment and Fourteenth Amendment retaliation claims (Counts VI and VII) are duplicative of their substantive claims under the Second Amendment (Count I) and Fourteenth Amendment (Count II). For the same reasons the Defendant stated in opposition to Plaintiffs' Second Amendment and Fourteenth Amendment claims (Doc. No. 195 at 42-43), Plaintiffs' motion for summary judgment on their retaliation claims should be denied, and the Village should be granted judgment as a matter of law.

CONCLUSION

In conclusion, Plaintiffs' claims are not justiciable because Plaintiffs' facial claims are moot, and Plaintiffs lack standing to bring their as-applied claims. In any event, Plaintiffs claims lack merit because any right to commercial sales in sensitive places falls outside the scope of the Second Amendment, and the Village's conditions on commercial arms sales are substantially related to the Village's important public safety goals. Any burden on interstate commerce is not clearly excessive in comparison to the public safety benefits of the Village's regulations. Finally, Plaintiffs' retaliation claims fail for the same reasons as their substantive claims.

WHEREFORE, Defendant prays that this Court grant judgment as matter of law for the Defendant, and against the Plaintiffs, as to each count of the Third Amended Complaint.

VILLAGE OF NORRIDGE

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One of its attorneys

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2016, I electronically filed the foregoing **DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to:

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